Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Amendment of the Over-The-Air Reception Devices Rule to Clarify the Extent to which Local Governments Can Regulate Non-Exclusive Use Areas	)	**FCC Docket No. _**MB-12-121
By W. Lee McVey, P.E.	)	
To: The Commission	)	

COMMENTS

Introduction

I have been a Commission licensee for many years.[1] And, my family and I have resided in the San Francisco Bay Area of California, Bradenton/Sarasota, Florida, and now in suburban Birmingham, Alabama. As consumers of televised media, we have had varied experiences before and after Congress mandated free choice of the several options available to receive television program material.

[1] W6EM, PG-12-19879

Our experience as residents of Florida has been by far the most troubling. Our residential developer did not permit us the freedom of choice with respect to receipt of television media for the several years it was in control of the subdivision community. Also, the City of Holmes Beach, adjoining where our rental property was located, demonstrated a particular disdain for outdoor antennas of any kind. Both experiences form the basis for this submittal.

My Comments in this proceeding are offered with the hope that the Commission will understand that its current regulations at 47CFR§1.4000, *et. seq*., the "OTARD Rule," are not doing the job Congress had intended; and that revisions are sorely needed to ensure unimpeded consumer choice in the method to receive television and Internet media. Methods unrestricted by local government ordinances, zoning regulations or developer/homeowner association restrictions, except for safety considerations.

Background

1. Section 2.07 of the Communications Act of 1996 (Act) directed the Commission to promulgate the OTARD Rule. The Act was passed by Congress and signed into law as a recognition of the virtues of new satellite technology offered by service providers and the many users anxious to obtain such services; but was viewed with a great deal of skepticism and trepidation by residential housing developers for the antennas it permitted. The Act directed the Commission to "promulgate regulations to prohibit restrictions that

impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of broadcast television and ... direct broadcast satellite services ...."

2. The OTARD Rule in its present form was adopted primarily through four opinions and reports released on August 6, 1996 (the "Report and Order"), September 23, 1998 (the "Order on Reconsideration"), November 20, 1998 ("Second Report and Order"), and October 25, 2000 (the "Competitive Networks Report and Order"). The initial OTARD Rule was adopted, discussed and clarified in the Report and Order and Order on Reconsideration. The rule was expanded to cover tenants in the Second Report and Order. The rule was additionally expanded in the Competitive Networks Report and Order to cover fixed wireless signals.

3. The Commission continues to "clarify" the rule primarily through its decisions in particular cases filed as Petitions for Declaratory Ruling. However, this process is lacking in its present form as it only addresses and resolves *individual-specific* claims on a case by case basis. It does <u>not</u> extend relief from defective local codes and ordinances or from developer-inspired conditions, covenants and restrictions (CC&Rs) beyond just a declaration that subject, contested language is “null, void and unenforceable.” There is neither a *mandate* in the OTARD Rule, nor one included in Declaratory Rulings issued under it, to require the <u>amendment or removal</u> of defective recorded ordinances or restrictions. Change is needed so that language left standing will not continue to *suppress or chill interest* in satellite, over-the-air TV, or Internet reception alternatives in others subject to the same restrictions.

Contempt for the OTARD Rule

4. Local government codified ordinances and zoning regulations have placed unreasonable burdens on antennas of all types, including those now protected by the OTARD Rule. For instance, in the case of the City of Holmes Beach, Florida, it enforces what it believes to be reasonable, codified limitations for outdoor antennas. Antennas may not be installed on residential structures[2] and antennas must be painted.[3] A *Special Exception Building Permit* is required for any antenna to be installed more than 35 feet above ground level.[4] Often, in heavily-treed areas, placement of over-the-air TV or satellite dishes on and above rooftops becomes necessary in order to receive a satisfactory signal. With the ban on residential rooftop antenna installations in Holmes Beach, any such installation would subject the owner to citation and corresponding fines until removed. And, if an alternative approach using a mast-top mounted antenna were to be used, the lengthy and costly special permit process could unreasonably delay an antenna installation and make it exorbitantly expensive. Limitations on antenna height and placement should only be subject to fall-down encroachment on adjoining properties or safe clearance from overhead electrical lines. Also, antennas designed for broadcast TV reception are not normally painted as manufactured. After-market attempts at painting by consumers would likely reduce antenna performance to unacceptable levels.

[2] Holmes Beach, Florida *Code of Ordinances*, Art. **XI**, Section 11.4(A)(3).
[3] *Ibid*, Art. **XI**, Section 11.4(B)(1)(b). Broadcast TV antennas are not painted by manufacturers. Owners attempts to do so would likely degrade antenna performance.
[4] *Ibid*, Art. **XI**, Section 11.8(A)(1).

5. Residential developers are still recording total antenna bans almost 16 years after the OTARD Rule was first promulgated. In the case of the Bradenton, Florida home owned by the author from 2000 until 2006, the developer, Neal Communities, is a case in point. Examples include some of its first homes in the Azalea Park subdivision[5] and its latest Woodbrook development in Manatee County, Florida.[6]. The following clause was last recorded in January, 2012 for the Woodbrook subdivision and has been used over and over for years:

> *"Antennae and Masts. No television, radio, or other electronic or communications antenna, mast, dish, disk or other similar device for sending or receiving television, radio, or other communication signals shall be permitted upon an Lot or improvement thereto, except in conformance with uniform rules and standards established by the ARC.[7] No such device is permitted under any circumstances if it sends, contributes to or creates interference with any radio, television or other communication reception or interferes with the operation of other visual or sound equipment located within any part of the Subdivision."*

Architectural Review Committees (ARCs)

6. Homeowner association ARCs are often used as "fences to hide behind." Language that *prohibits antennas of any kind, unless in accordance with guidelines issued by the ARC* is a frequent approach. The default position is, of course, total prohibition. In many cases, developers remain in control of homeowner associations for years until all homes in a development are sold. And, during that interval, they are reluctant to set up or operate an ARC. For instance, based on documents recorded

[5] Recorded at Book 1154, Page 1293, of Manatee County Official Records, August 1986.
[6] Recorded at Book 2406, Page 3333, of Manatee County Official Records, January 2012.
[7] Architectural Review Committee.

recently, Neal Communities, and its successor-subsidiary, have been in control of its Wisteria Park subdivision homeowner association for more than six years. It was in control of the Laurel Oak Park subdivision where we resided, from 1999 until 2002. As such, the developer is the homeowner association and either the ARC does not exist or consists of developer employees as it did at Neal's Laurel Oak Park for the first two years of our residency. Simply, the developer can say: "No ARC guidelines have been written and none will be produced until after turnover to residents." So all OTARD permissible antennas of any form are prohibited by absence of ARC guidelines. Guidelines are essentially amendments to the covenants by reference and are not recorded. Yet the words, ideas and committee concepts have the full force of CC&R restrictive covenants by reference. Even if made available to prospective homeowners to examine before close of escrow (they weren't in our case since they didn't exist), ARC guidelines, rules and standards could change at any time and are usually not subject to majority approval by all homeowners. Guidelines can indeed be flippant as they are subject to the whims of several homeowners who make up the committee or the developer.[8]

Anti-Competitive Arrangements Benefit Cable Television

6. Developer Neal Communities arranged with a cable television company for flat-rate cable service for several of its developments, leaving its restrictive covenants in

[8] For example, Neal Communities would not allow the installation of maintenance-free polymeric perimeter fences prior to turnover, so wooden fences that had to be repainted every two years were constructed by several owners. After turnover to an owner-controlled homeowner association, the ARC changed the guideline, requiring all fences to be maintenance-free polymeric material.

place banning any and all sorts of outdoor antennas. A means to give the local cable company, Time Warner's Brighthouse Networks, an anti-competitive advantage over satellite dish service in Neal's developments. With 10 year contract commitments written and effected by Neal on behalf of the homeowner associations it set up and controlled, each homeowner was then required to pay for cable TV service as a lumped-in part of semi-annual assessments whether they used the cable TV service or not. The practice continues to this day, to my knowledge. The master cable TV contract for our community, Laurel Oak Park, was signed by Neal in 1998,[9] and a similar contract between Bright House Networks and the Wisteria Park became effective in 2005.[10] The overzealous antenna restraints by the City of Holmes Beach apparently have a similar underlying purpose.

A Continuous Chilling Effect

8. The proliferation of non-OTARD-compliant antenna ordinances and restrictions creates a chilling effect. For example, a family might wish to install a TV antenna on the rooftop of their home in Holmes Beach, or in one of Neal's developments in Bradenton/Sarasota. The likely result would be either a citation by a code enforcement officer or homeowner association and a fine. The absence of permissive language acts as a *defacto total ban* on outside antennas of any kind on rooftops. As both the City of Holmes Beach and developer Neal apparently desire. Vague and overly restrictive

[9] See Book 1601, Page 2680, *Official Records of Manatee County, Florida* Pages 61-64 and 68. Attached as Exhibits 1(A)-(D).
[10] See Book 2026, Page 7953, *Official Records of Manatee County, Florida*. Attached as Exhibit 2.

language suppresses interest in *any* alternative to cable TV service. While some might argue that attic antennas will function for receipt of over-the-air TV, their effectiveness is considerably limited, especially in fringe reception areas and by metal ducting, pipes and vents in attic spaces and when roofs are wet, as they are a good part of the time in Florida.

.

Aesthetics Concerns A Charade

9. Community aesthetics concerns over unsightly appurtenances are quite arbitrary. For instance, lightning rod 'picket fences' on roof ridgelines, around perimeters and atop chimneys are seemingly no problem for local governments, developers or homeowner associations. Nor are the large, unpainted copper bonding conductors running along ridgelines and down outside walls to ground rod arrays along structure perimeters. There are no restrictions on rooftop air-terminal lightning protection systems in the Holmes Beach Code of Ordinances cited above nor in any documents Neal Communities recorded for its developments from 1986 through 2012.[11] Amazingly silent on the subject of lightning protection within a region often referred to as "the lightning capital of the world."[12] Perhaps authors of aesthetically-focused ordinances and covenant restrictions wish to dodge liability for loss in the event of damage from a direct lightning strike by not restricting the application of antenna-like lightning protection systems.

[11] Azalea Park, University Park, Mango Park, Laurel Oak Park, Wisteria Park, Forest Creek, River's Reach, River Sound, Central Park, or Woodbrook. All are developments in Manatee County, Florida. Neal claims to have constructed more than 8,000 homes.

[12] West Central Florida is generally accepted to have the world's highest *isokeraunic level* [number of annual thunderstorms producing cloud to ground lightning strikes].

Recommended Revisions to the OTARD Rule

10. The OTARD Rule in its present form allows relief from restrictions, but only on an individual complainant basis.[13] A finding by the Commission that a particular rule, restriction or ordinance is null, void, and unenforceable affects only the Petitioner wishing to install an antenna, but does nothing to remove the offending language so that all others under the same restraint would benefit from the finding and not have to repeat the process all over again to obtain relief. Or, just give up and accept *the Neal Communities approach* of mandated cable TV. OTARD should be revised so that developers, local governments and homeowner associations would be required to amend ordinances, covenants and restrictions to remove all non-OTARD-compliant language and cancel or modify mandated, anti-competitive contracts.

11. Furthermore, it should not require a formal Petition for Declaratory Ruling before the Commission to obtain relief from otherwise-obvious, non-compliant ordinances or restrictions similar to the offered examples affecting whole communities. The legal costs to individuals to pursue the freedom of choice guaranteed by the OTARD Rule are not insignificant. Penal provisions should be established and applied to the OTARD Rule such that, upon receipt of a valid complaint, investigation and prosecution would follow, as necessary. And, the follow-on issuance of commensurate citations and forfeitures if

[13] See 47**CFR§**1.4000(e)-(h).

offending, non-compliant language is not removed from codified local ordinances and recorded homeowner association land use restrictions.

Respectfully Submitted this 5th day of June, 2012

W. Lee McVey, P.E.
3 Squires Glenn Lane
Leeds, AL 35094-4564

Enclosures:

Exhibits 1(A),(B),(C),(D), and 2.